

## An Annotated Workplan for FATCA Compliance

by Allen J. Littman

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# PRACTITIONERS' CORNER

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by Allen J. Littman



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**T**he deadlines for complying with the Foreign Account Tax Compliance Act are looming.<sup>1</sup> Full compliance registration for foreign financial institutions closes on April 25, 2014.<sup>2</sup> FFIs are required to engage in extensive preparations to comply with 500 pages (which recently mushroomed to almost 1,100 pages) of dense and technical Treasury regulations. Although most large financial institutions worldwide are far along in their compliance efforts, there are numerous mid-size and smaller FFIs that are well behind the curve.

This article provides a brief workplan template that is annotated to explain the steps required for FATCA compliance by FFIs. It is not intended to be a completely detailed workplan, but it may serve as a guide for preparing it.

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<sup>1</sup>For a list of current deadlines (accurate as of the publication date of this article), see Allen J. Littman and Sarah K. Ma, “Revised Guidelines and Timelines Under FATCA,” available at <http://bakerlaw.com/articles/revised-guidelines-and-timelines-under-fatca>.

<sup>2</sup>Apr. 25, 2014, is the deadline to ensure registration and placement on the initial IRS list of compliant FFIs that will be issued on June 2, 2014, and effective on July 1, 2014.

### Nature and Scope of Work

The nature of the work involved in this workplan includes:

- U.S. tax legal expertise providing tailored FATCA analysis and advice (referred to below as “U.S. FATCA tax expertise”);
- systems design and implementation, which encompasses both:
  - human systems and procedures; and
  - data processing systems (referred to as “systems and procedures expertise”); and
- local country nontax legal expertise (“local legal expertise”).

It is important for service providers with these different skill sets to work independently on their tasks while at the same time closely coordinating with each other and with the in-house FATCA implementation team of the FFI.

### Workplan

The workplan is divided into three phases:

- *Phase One*: General assessment and planning of implementation.
- *Phase Two*: Implementation.
- *Phase Three*: Post-implementation follow-up assistance.

Each phase is described in more detail below. The primary service provider for each task step is indicated below in parentheses. However, other service providers may play a supporting or coordinating role.

#### Phase One

Phase One is the general assessment and planning of implementation. It consists of the following tasks:

- Provide initial general advice regarding how FATCA will affect the client’s organization and

how it should organize its compliance effort (U.S. FATCA tax expertise). This is general advice and may be most valuable in the form of a memorandum or other writing tailored to the client's particular circumstances, provided with the best pre-engagement understanding of the client's general fact pattern. The memorandum could be updated periodically or at the close of the engagement to take into account the latest understanding of the client's facts.

- Perform a legal and operational analysis of all the legal entities in the business group on a global basis, in order to identify:
  - The FATCA categorization of each entity and whether it meets one of the many exemptions (U.S. FATCA tax expertise). This step requires a detailed understanding of the activities, services, and products provided by each legal entity in the client's expanded affiliated group. The summary result of this task should be a list of entities in the expanded affiliated group, the initial categorization of each of these entities by type of FFI, and whether the FFI is exempt from FATCA. If it is not an FFI, the type of non-FFI entity should be determined (or guidelines should be provided for the client to apply the relevant facts to make the determination). The summary list should be supported by a factual and legal analysis for each entity.
  - Whether the client's group as a whole or any individual entity is able to avoid some or all of the restrictions of FATCA or may minimize the compliance effort through simple business restructuring, either regarding a particular entity or involving multiple entities (U.S. FATCA tax expertise). In this step, it is determined whether each entity qualifies for any deemed-compliant status (and which ones).
  - The systems and procedures that should be changed or newly developed to address:
    - due diligence on new and preexisting accounts;
    - withholding and related reporting;
    - controls and certification; and
    - reporting of U.S. accounts (systems and procedures expertise).

This step addresses the identification of both human systems and procedures and data processing systems involved in the tasks described above. In many environments, this task may be wholly or partly fulfilled through an overlay hardware/software system that performs the new procedures and also assists in the management or prompting of the humans intervening in these functions.

- Determine local law impediments to compliance and potential solutions to those impediments (local legal expertise and U.S. FATCA tax expertise). FATCA has special rules relating to local law restrictions on some reporting or actions. In general, these rules apply under the FATCA regulations (that is, in a country that has not entered into a Model 1 intergovernmental agreement). It is important to determine the nature and extent of the local law restrictions, how they affect FATCA compliance, and what work-arounds may be available under local law and FATCA.
- Plan the implementation, including timing and deadlines of steps in conformity with the law:
  - *Systems and procedures (systems and procedures expertise)*. In this step, considering the understanding of the client's FATCA situation based on the earlier steps of Phase One, the types of products and services it provides, the size of its client base, and the optimal balance of development among software, human procedures, and manual systems, a plan is put into place for the development of the systems and procedures required for FATCA compliance. This plan takes into account the required FATCA deadlines for activating each component of the systems and procedures.
  - *Compliance with U.S. law (U.S. FATCA tax expertise)*. The systems and procedures to be put into place must be evaluated to ensure their compliance with FATCA. This is an ongoing process, but it is treated as a separate step for clarity.
  - *Compliance with local law (local legal expertise)*. The systems and procedures to be put into place must be evaluated to ensure their compliance with local law. This is an ongoing process, but it is treated as a separate step for clarity.

## Phase Two

Phase Two is the implementation of FATCA and consists of the following tasks:

- *Direct FATCA registration (U.S. FATCA tax expertise)*. This step consists of the actual registration with the IRS of each legal entity that is required to register as an FFI under FATCA. This step could also be conducted by the management of the FFI, under the guidance of U.S. FATCA tax expertise. For an FFI operating in a country that has entered into a Model 1 IGA, the registration may also be made with the government of that country, and that could be conducted by the local legal expertise.
- *Prepare appropriate IRS Forms W-8BEN-E for each entity (U.S. FATCA tax expertise)*. Each entity in the expanded affiliated group must prepare a new

Form W-8BEN-E and submit it to each U.S. withholding agent and compliant FFI from whom it receives a withholdable payment or maintains an account. The form must be prepared to reflect the entity's FATCA categorization, exemption, and deemed-compliant status (if any).

- *Direct design and implementation of systems and procedures to comply with FATCA (systems and procedures expertise).* This step consists of the timely design and implementation of the systems and procedures planned during Phase One. Systems and procedures expertise involvement may range from monitoring and advising the client's in-house IT group to a more hands-on approach, including implementation of a turnkey system.
- *Direct implementation of any business restructuring to effectively respond to FATCA (local legal expertise).* This step would be taken if restructuring of some business elements is advisable in order to simplify FATCA compliance. For example, one FFI may transfer its U.S. accounts to another FFI in the group if that will allow the first FFI to be considered deemed-compliant and thereby simplify the group compliance efforts.
- *Implement compliance standards (local legal expertise).* In this step, compliance standards required by FATCA would be implemented. This includes the human systems and activities to be performed as well as ensuring that these are integrated with the data processing systems. The most time-sensitive part of this is to ensure that FATCA account intake compliance standards are implemented for new accounts by July 1, 2014.
- *Adapt compliance standards and policy manuals, as well as internal control and audit guidelines (systems and procedures expertise).* In this step, existing documentation of compliance procedures, including policy manuals, internal control documentation, and audit guidelines, must be identified, amended, and approved by management.
- *Organize and implement communication strategies for appropriately disclosing FATCA consequences to both U.S. and non-U.S. account holders (local legal expertise).* Account holders may not understand the significant consequences to them of FATCA, or may imagine consequences that are nonexistent. Also, communications with account holders may be subject to local law requirements. It is important that each FFI appropriately informs its customers in a manner that will assist with FATCA compliance and foster positive customer relations.
- *Update customer agreements and terms and conditions (local legal expertise).* In this step, customer agreements and terms and conditions must be updated to take into account FATCA compliance requirements and must be provided to, and approved by, customers (as required under local law).

- *Review and address contracts (local legal expertise).* Non-customer contracts and agreements must be reviewed for compliance with FATCA, to protect against noncompliance by a counterparty, and to determine the potential impact of FATCA. The appropriate balance between local legal expertise and in-house review may depend on the circumstances of the particular client and the type of contracts involved.
- *Train processors and customer relationship people in FATCA compliance issues and due diligence (systems and procedures expertise).* In-house individuals involved in, or affected by, FATCA should be trained in compliance activities and sensitized to a large range of potential issues that may arise because of FATCA, including marketing and customer issues.
- *Direct implementation of ongoing FATCA compliance (systems and procedures expertise).* FFIs have a continuing obligation to maintain compliance with FATCA, including periodic program reporting. This step consists of the implementation of follow-up compliance activities as well as monitoring to ensure that the implemented compliance activities are, in fact, continuing appropriately.

### Phase Three

Phase Three is post-implementation follow-up assistance, which will mostly be performed on request, and consists of the following tasks:

- *Provide optional full or partial legal opinion on FATCA compliance (U.S. FATCA tax expertise).* The issuance of a full or partial legal opinion regarding FATCA may be required or advisable under local law, may be required or requested by the FFI's regular independent financial auditor in connection with the financial statements, or may simply be desired by the management or the board of directors.
- *Address any ongoing retesting issues (systems and procedures expertise).* In this step, advice or assistance on any specific customer FATCA issue (for example, relating to due diligence or reporting) will be given.
- *Address any ongoing customer or contracts issues (local legal expertise).* In this step, advice or assistance on any customer or contracts legal issue (for example, determining the appropriate FATCA language to insert into a new contract or regarding a new product or service) will be given.
- *Advise on and respond to ongoing legal or other developments in the FATCA area, including IGAs and passthrough withholding (U.S. FATCA tax expertise).* Legal (and other) developments affecting FATCA are continually monitored and analyzed (primarily by the adviser with U.S. FATCA legal expertise). That information and analysis may be regularly provided to the client to ensure timely and cost-effective FATCA compliance. ◆